Supreme Court, U.S.
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No. 95-82

In The

Supreme Court of the United States

October Term, 1995

BENJAMIN G. SPRECHER,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAVID I. SCHOEN
Counsel of Record
Attorney for Petitioner
2800 Zelda Road
Suite 100-6
Montgomery, Alabama 36106
(334) 272-4443

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-0990

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QUESTIONS PRESENTED

1. Whether a federal criminal defendant is procedurally barred from raising a Sixth Amendment claim of ineffective assistance of counsel in a petition filed pursuant to 28 U.S.C. Section 2255 if he did not raise such a claim on his direct appeal in a case in which there was no opportunity provided to develop a record or frame the issue in the trial court prior to the direct appeal.
2. Whether a federal criminal defendant should be deemed to have waived his fundamental constitutional right to testify on his own behalf in a case in which trial counsel, for reasons unrelated to any concern of perjury, threatened to resign if the defendant insisted on testifying.

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October Term, 1995

BENJAMIN G. SPRECHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Dr. Benjamin G. Sprecher respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals and the order denying rehearing (App., *infra*, A1-A7) are unreported. The opinion of the district court (App., *infra*, A8-A20) also is unreported.

JURISDICTION

The court of appeals entered its judgment on February 15, 1995 (App., *infra*, A1) and denied rehearing on March 16, 1995 (App., *infra*, A6-A7).[1] The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

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[1] By Order dated June 5, 1995, this Court granted Dr. Sprecher an extension of time for filing his petition for certiorari up to and including July 14, 1995.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States provides, in relevant part, " *** nor shall any person *** be deprived of life, liberty, or property, without due process of law."

Amendment VI to the Constitution of the United States provides, in relevant part, "[I]n all criminal prosecutions, the accused shall enjoy the right *** to have the Assistance of Counsel for his defence."

22 U.S.C. Section 2255 provides, in relevant part, the following:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States *** or is otherwise subject to collateral attack, may move the court which imposed sentence to vacate, set aside or correct the sentence ***.

STATEMENT

I. Procedural History

On January 9, 1992, after a bench trial, Petitioner, Dr. Benjamin G. Sprecher was convicted of various securities charges and related offenses. *United States v. Sprecher*, 783 F. Supp. 133 (S.D.N.Y. 1992). He was sentenced to a term of imprisonment of forty-six months, followed by two years of supervised release. He also was fined fifty thousand dollars and specially assessed five hundred dollars. On direct appeal, his conviction was affirmed; but his case was remanded for resentencing. *United States v. Sprecher*, 988 F.2d 318 (2d Cir. 1993). On remand, his sentence of imprisonment was reduced to thirty-seven months and an amended judgment of conviction so reflecting was entered on March 13, 1993.

In the Spring of 1993, Dr. Sprecher filed *pro se* motions challenging his conviction and sentence which were treated as a

motion pursuant to 28 U.S.C. Section 2255. In his motion, Dr. Sprecher raised various constitutional issues, primary among which were allegations of ineffective assistance of counsel, a denial of his constitutional right to testify and prosecutorial misconduct in violation of his rights under the Fifth and Sixth Amendments to the United States Constitution. The district court held a brief and very limited evidentiary hearing on some of the allegations and, on March 29, 1994, entered a Memorandum Opinion and Order, denying the requested relief in its entirety. (App., *infra*, A8-A20).

The court denied the bulk of Dr. Sprecher's claims related to the ineffective assistance of counsel on grounds of procedural bar for his failure to raise such claims on direct appeal, despite the court's own advice to Petitioner at his pre-sentencing conference that he could raise claims concerning trial counsel's ineffective assistance of counsel in a petition filed pursuant to 28 U.S.C. Section 2255 without waiving anything.[2] Other claims were denied on the merits based solely on affidavits. On appeal the Second Circuit affirmed and denied rehearing. (App., *infra*, A1-A7).

The court of appeals had jurisdiction to hear the appeal pursuant to 28 U.S.C. Section 1291 and this Court has jurisdiction to review this case pursuant to 28 U.S.C. Section 1254(1). Petitioner asserts that the decision below with respect to the application of a procedural bar to his claims of ineffective assistance of counsel is in conflict with decisions from every other Circuit in the country and reflects an erroneous decision on an important constitutional principle. Petitioner further asserts that the decision below reflects an erroneous decision on an important legal question insofar as it finds that Dr. Sprecher waived his constitutional right to testify on his own behalf at trial.

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[2] This fact was conceded by the government in its memorandum of law filed in the district court and found at page 311 of the Joint Appendix filed by the parties below.

II. Facts Material to the Consideration of the Questions Presented

The following is a concise statement of those facts that are directly relevant to this Court's consideration of the questions presented:

A. Sixth Amendment Right to Counsel and Procedural Bar

In his 2255 Petition, Dr. Sprecher raised allegations that he was denied his rights under the Sixth Amendment to effective assistance of counsel based upon the acts and omissions of his trial counsel. Petitioner alleged that trial counsel's performance was constitutionally defective in a number of specified areas all of which adversely affected the Petitioner. Dr. Sprecher alleged that trial counsel entered into certain substantive stipulations that were against his interests, that trial counsel failed to pursue whole areas of examination that were critically important to the case, that trial counsel failed to enter objections to inadmissible evidence, and that trial counsel otherwise refrained from making certain viable motions and factual and legal arguments that should have been made by any reasonably competent attorney in such a case. As will be discussed in a later section of this Petition, the courts below refused to consider the merits of any of these claims solely because they were not raised on direct appeal.

Dr. Sprecher also asserted in his 2255 Petition that trial counsel failed to call certain key witnesses to testify on his behalf, coerced him into waiving his right to a jury trial, and deprived him of his right to testify on his own behalf by threatening to resign if Petitioner insisted on testifying. Dr. Sprecher asserted that a motivating factor behind trial counsel's conduct was counsel's interest in currying favor with the government because of criminal and professional problems counsel faced.[3]

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[3] Trial counsel, Mr. Ivan Fisher, was the subject of an investigation by an Organized Crime Strike Force in the Eastern District of New York. Ultimately,

The district court refused to consider the bulk of Dr. Sprecher's ineffective assistance of counsel claims. The court, purportedly relying on the Second Circuit's decision in *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993),[4] held that because Petitioner had a new attorney for his direct appeal, his "post-appeal attack on the conviction based on ineffective assistance of trial counsel is limited to matters outside the trial record." (App., *infra* at A10). The court then went on to find that all of the Petitioner's claims that related to the heart of the trial (e.g. the failure to pursue lines of examination, failure to object to inadmissible evidence, failure to make certain motions and arguments, and counsel's decision to enter into certain stipulations) were procedurally barred and would not be considered. (App., *infra*, at A10).[5] The Second Circuit affirmed, thereby putting

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he pled guilty to three criminal tax charges and, at the time of Dr. Sprecher's trial, faced professional disciplinary proceedings. The record below was supplemented to reflect counsel's criminal and professional problems to some degree. They are also described in *United States v. Levy*, 25 F.3d 146 (2d Cir. 1994).

4 Petitioner will demonstrate below the manner in which the Second Circuit's decision in *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993) conflicts with authority on the subject from virtually every other Circuit in the country and why, with all due respect, it was erroneously decided. It is respectfully submitted here, however, that the district judge below, while purporting to base her decision on *Billy-Eko*, actually misconstrued *Billy-Eko* to adopt even a more onerous standard. This point will be further developed below.

5 Rather oddly, the district court also found that such matters would not give rise to a "constitutional claim of ineffective assistance of counsel" because they "...fall under the heading of trial strategy." (App., *infra*, at A10). Such a position virtually would eviscerate any right to challenge a conviction based on ineffective assistance of counsel. The focus of an ineffectiveness claim and the requirement of showing an adverse impact necessarily require an examination of such aspects of counsel's performance at trial. The inquiry in this context is not whether it is the sort of matter which can fall under the "heading" of "trial strategy"; rather it must be a fact based inquiry concerning matters that fall under such a heading to determine if counsel's acts or omissions and the reasons therefor constitute **reasonable** trial strategy under the circumstances of the case

it's imprimatur on this latest application of and variation on the decision in *Billy-Eko v. United States*, 8 F.3d 111 (2d Cir. 1993).

B. Denial of Defendant's Right to Testify on His Own Behalf

With respect to Dr. Sprecher's claim that trial counsel prevented him from exercising his right to testify on his own behalf by, *inter alia*, threatening to resign if Petitioner insisted on testifying, the court acknowledged that trial counsel admitted that it was "possible" that he "might" have made such a threat. However, the court held, in effect, (at the government's urging) that, since Petitioner was aware of his right to testify, he waived such right by not insisting on it.[6] (App., *infra*, at A12).

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision in this case with respect to the application of a procedural bar to claims of ineffective assistance of counsel not raised on direct appeal squarely conflicts with authority from virtually every other Circuit in the country. Indeed, in the Second Circuit's most recent detailed enunciation of its position on this issue, it acknowledged the conflict and its disagreement with other Circuits and with the position of the Solicitor General of the United States. *Billy-Eko v. United States*, 8 F.3d 111, 115 (2d Cir. 1993). A description of the history of this issue in the Second Circuit will be provided as a preliminary matter. This issue is a constantly recurring one in all Circuits and this case provides a timely vehicle

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at hand. Interestingly, in the instant case, the record reflects no justification from trial counsel which would support a finding of "reasonable trial strategy". The district court never even engaged in an analysis of the reasonableness of such acts and omissions as matters of "trial strategy".

6 The Second Circuit, in an earlier case, had expressed grave doubts about this exact argument, but did not decide the issue. *United States v. Vargas*, 920 F.2d 167, 170 (2d Cir. 1990), cert. denied sub nom., *Duluc del Rosario v. United States*, 502 U.S. 826, 112 S.Ct. 93, 116 L.Ed.2d 64 (1991).

for this Court to provide guidance to the courts below.[7] Moreover, the decision below is erroneous and the issue that it addresses is important.

The finding of an implied waiver of the Petitioner's right to testify on his own behalf at trial in the face of evidence that trial counsel threatened to resign if Petititioner exercised such right is an erroneous decision on a fundamentally important legal issue.

I. The Second Circuit's Application of a Procedural Bar to Sixth Amendment Claims of Ineffective of Counsel Not Raised On Direct Appeal Squarely Conflicts With Decisions of Virtually All Other Circuits and With the Position of the Solicitor General

A. Historical Background of the Issue In the Second Circuit

The Billy-Eko Decisions

John Billy-Eko, a pilot for Nigeria Airways, was arrested in 1987 and, after a jury trial in the Eastern District of New York, was convicted of various drug offenses. Represented by new counsel on

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[7] On June 21, 1993, this Court granted certiorari on this precise issue and vacated the Second Circuit's judgment in that case based on the Solicitor General's concession that the Second Circuit's position on procedural default with respect to ineffective assistance of counsel claims was erroneous. *Billy-Eko v. United States*, — U.S. —, 113 S.Ct. 2989, 125 L.Ed.2d 685 (1993). On remand in that case, the Second Circuit modified its position; but it enunciated a principle in its decision which it acknowledged still left it in disagreement with the Solicitor General. *Billy-Eko v. United States*, 8 F.3d 111, 115 (2d Cir. 1993). In the instant case, the Second Circuit's application of a procedural bar to this Petitioner's claims of ineffective assistance of counsel reflects a return to the Circuit's position prior to this Court's grant of certiorari in the *Billy-Eko* case. This highlights the appropriateness of granting certiorari in the instant case. Clearly, this Court has recognized the importance of this issue and the same reasons that supported the granting of certiorari in the *Billy-Eko* case apply here in full force.

appeal, Billy-Eko appealed his conviction to the United States Court of Appeals for the Second Circuit. On his direct appeal, he raised issues unrelated to ineffective assistance of counsel and his conviction was affirmed in an unpublished summary order. *United States v. Billy-Eko*, 863 F.2d 46 (2d Cir. 1988) (mem.).

Two years later, Billy-Eko filed *pro se* a motion to vacate his sentence pursuant to 28 U.S.C. Section 2255. In his motion, he set forth various claims of ineffective assistance of counsel and government misconduct. None of these claims had been raised on his direct appeal. The district court denied Billy-Eko's claims on the merits and he appealed, now represented by counsel who was new to the case. The Second Circuit declined to reach the merits of his claims, holding that the claims were procedurally barred due to his failure to raise such claims on direct appeal. *Billy-Eko v. United States*, 968 F.2d 281, 283 (2d Cir. 1992) ("*Billy-Eko I*").

Billy-Eko next filed a petition for certiorari in this Court and this Court granted certiorari and vacated the Second Circuit's decision. *Billy-Eko v. United States*, —U.S.—, 113 S.Ct. 2989, 125 L.Ed.2d 685 (1993). This Court remanded the case for "further consideration in light of the position asserted by the Acting Solicitor General in his brief for the United States filed May 28, 1993." *Id.* The Solicitor General had taken issue with the Second Circuit's position on the application of rules of procedural default to claims of ineffective assistance of counsel, noting that, for several reasons, such claims should not be procedurally barred for the failure to raise them on direct appeal and, indeed, are more conducive to resolution on collateral review than on direct appeal. See also, *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984) (noting argument by Solicitor General that ineffective assistance claims are more properly brought in Section 2255 petitions than on direct appeal).

The Second Circuit had based its finding of a procedural bar in *Billy-Eko I* on its earlier decision in *Campino v. United States*, 968 F.2d 187 (2d Cir. 1992), in which the court adopted a rule that all constitutional claims will be procedurally barred from collateral review if they were not raised on direct appeal and if the petitioner

cannot demonstrate "cause and prejudice" for her failure to raise them on direct appeal. See *Billy-Eko*, 968 F.2d at 283.

Upon further consideration of the matter on remand from this Court, the Second Circuit recognized that a Sixth Amendment claim of ineffective assistance of counsel "should not necessarily be treated similarly to a failure to raise other constitutional claims." *Billy-Eko v. United States*, 8 F.3d 111, 114 (2d Cir. 1993) ("*Billy-Eko II*"). The court acknowledged the merit of the Solicitor General's position that such claims generally require the development of an evidentiary record which is only possible on collateral review. *Id.* The court went further and acknowledged that claims of ineffective assistance of counsel are "often based on assertions that trial counsel made errors of omission, errors that are difficult to perceive from the record ...." *Id.*

The court in *Billy-Eko II* then acknowledged that most other Circuits already had recognized these factors concerning ineffective assistance of counsel claims and already had made clear that such claims ought to be raised and considered in the context of collateral review (a Section 2255 petition) rather than on direct appeal. *Id.* Indeed, as the court noted, rather than finding a procedural default from the failure to raise such a claim on direct appeal, the other Circuits had established a **preference** for having ineffective assistance of counsel claims brought in a Section 2255 petition.[8]

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[8] In its survey of other Circuits, the court in *Billy-Eko II* at 114 cites to First, Third, Fourth, Sixth, Eighth, and Ninth Circuit decisions that indicate a preference for reviewing ineffective assistance of counsel claims on collateral petitions rather than on direct appeal. In fact, every Circuit other than the Second Circuit has long held such a position. See e.g., *United States v. Arango*, 953 F.2d 1312, 1327 (11th Cir. 1988) (Ineffective assistance of counsel claims must be raised in a 2255 petition as opposed to on direct appeal because of the need to develop the factual basis.); *United States v. Robertson*, 45 F.3d 1423, 1435-35 (10th Cir. 1995) ("We have consistently held that the preferred method for challenging

The Second Circuit in *Billy-Eko II* then noted its "substantial" agreement with the view reflected in the decisions from the other Circuits; that is, that claims of ineffective assistance of counsel ought to be brought on collateral petitions rather than indirect appeal generally. However, the court went on to carve out a "limitation" on the rule that, in its application, has the effect of swallowing up the rule and creating a morass of confusion for every criminal defendant and her attorney.

The court described its "limitation" to the general rule as the following: If a criminal defendant has new appellate counsel for his direct appeal and if his ineffective assistance of counsel claim "is based solely on the record developed at trial", then such a defendant who does not bring this claim on his direct appeal is procedurally barred from ever bringing the claim, absent a showing of "cause" and "prejudice" for the procedural default. *Id.*

The court in *Billy-Eko II* defined its procedural default rule first as applying to a claim "based solely on the record developed at trial" then elsewhere described it as referring to a claim based on a record that is "fully developed on the ineffective assistance of counsel claim." *Billy-Eko*, 8 F.3d at 115. The two expressions mean different things and both are far too ambiguous to lead to anything other than confusion. Later in the decision, the court indicated that the test is whether the issue needs "further factual finding." *Id.* at 116.

The instant case provides the best illustration of how far a court can go wrong in applying the standard. Here, the court found that all of Dr. Sprecher's claims of ineffectiveness that related to any matter in the trial record were procedurally barred, reading *Billy-Eko II* to require such a result. While the *Billy-Eko II* court purported to limit the exception to that "narrow category of cases" that had a trial record "fully developed" on the ineffectiveness issue, the court in

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the effectiveness of counsel is by collateral attack...) (Emphasis added). The status of the various Circuits on the question will be discussed below in further detail.

Dr. Sprecher's case interpreted *Billy-Eko II* to mean that only ineffectiveness claims that relate to matters "outside the trial record" can be brought on collateral review. (App., *infra*, at A10). There was no analysis whatsoever as to whether the issues ever were "developed" in the trial record in any way that framed them; rather the court found it dispositive for procedural default purposes that the claims related to evidentiary matters and other things that occurred at the trial. That is contrary to the position of every Circuit in the country. Indeed, even the cases upon which the Second Circuit purported to rely for support in carving out its "exception" make clear that the very sort of claims that Dr. Sprecher tried to raise and found barred **cannot** be determined from a bare trial record and must proceed on collateral review. See e.g., *Beaulieu v. United States*, 930 F.2d 805, 808 (10th Cir. 1991).

The additional irony in the instant case is that the same district judge who denied Dr. Sprecher's claims on the basis of a procedural default indicated to him at a May 8, 1992 pre-sentence conference that he could wait to bring his ineffective assistance of counsel claims in a Section 2255 petition without waiving anything. See Joint Appendix filed below at 311.

The Second Circuit has developed its procedural default rule while expressly recognizing that its position is in direct conflict with the Solicitor General's position on the matter, simply dismissing out of hand the Solicitor General's view that such a rule would prove too confusing for criminal defendants and their attorneys.[9] *Id.* at 115.

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[9] In developing this "limitation" on the general rule, the court in *Billy-Eko II* purported to rely on authority from two other Circuits, citing language from the decisions in *United States v. Phillips*, 914 F.2d 835, 846 (7th Cir. 1990) and *Beaulieu v. United States*, 930 F.2d 805, 807 (10th Cir. 1991). *Billy-Eko*, 8 F.3d 111 at 115. A reading of those cases instantly reveals that the quoted language is nothing but *dicta*. Indeed, in both cases, the respective Circuits found the claims of ineffectiveness therein raised entirely inappropriate for review on direct appeal. The court in *Beaulieu*, in fact, vehemently emphasized the preference for raising ineffectiveness claims on collateral review and not on

The *Billy-Eko II* court suggested that parties should be able to discern a "clear distinction" between those kinds of ineffectiveness claims that could be decided on the bare trial record and those that would need further factual development. *Billy-Eko II*, 8 F.3d at 115-16. However, a consideration of the analysis by the court of the claims Mr. Billy-Eko presented belies such a contention. See *Id.* At 116. Two things are especially interesting about the *Billy-Eko II* court's efforts at supporting and applying its thesis. First, to illustrate its position, the court uses a case in which the ineffective assistance of counsel claim is based on a conflict of interest theory. In the case at issue, *United States v. Fulton*, 5 F.3d 605 (2d Cir. 1993), a hearing was conducted in the trial court following the disclosure on the trial record that trial counsel was implicated in narcotics transactions with one of the defendants. The court found ineffective assistance of counsel on direct appeal based on the testimony adduced in the trial court specifically on the conflict of interest. *Id.* Such an example in no way meaningfully supports the court's procedural bar rule. No one disputes the proposition that there can be a case in which trial counsel's ineffectiveness is so glaringly clear from the bare trial record so that a conviction could be reversed on direct appeal based on such a finding.[10] Moreover, in *Fulton*, a full hearing was held that framed the ineffectivenss claim during the trial.

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direct appeal. *Beaulieu*, 930 F.2d at 806-07. The court in *Phillips*, actively emphasized that the ineffectiveness claims raised therein could not be discerned from the bare record and had to be raised in a 2255 petition. *Phillips*, 914 F.2d at 846. In this regard the Eleventh Circuit's general *per se* rule against permitting such claims altogether on direct appeal is worth noting. See *United States v. Arango*, 853 F.2d 818 (11th Cir. 1988). This will be discussed below.

[10] Indeed, even the Eleventh Circuit, which purports to have an absolute rule against considering ineffective assistance of counsel claims on direct appeal, *United States v. Arango*, 853 F.2d 818 (11th Cir. 1988), recognizes that some conduct by trial counsel is so obviously ineffective as to be recognizable as such from the trial record without need for more. *United States v. Andrews*, 953 F.2d 1312 (11th Cir. 1992).

Also significant is the *Billy-Eko II* court's application of its rule to Mr. Billy-Eko's claims. The court specifically noted the difficulty of considering ineffectiveness claims based on evidentiary related acts or omissions exclusively by reading the trial record without additional factual development. It found that such claims by Mr. Billy-Eko were not and could not be procedurally barred. Those are exactly the type of claims Dr. Sprecher had procedurally barred from review in his case, based on a finding that the claims did not relate to matters "outside the trial record". (App., *infra*, at A10). This certainly would seem to undercut the Second Circuit's view that its rule will lead to "clear distinction[s]". The fact that the Second Circuit affirmed in the instant case only further highlights the problem and illustrates the Circuit's retrenchment to a pre-*Billy-Eko II* position.[11]

B. The Second Circuit's Conflict With All Other Circuits

There is not another Circuit court in the country that would apply a procedural bar to the kinds of ineffective assistance of counsel claims the district court and the Second Circuit found to be procedurally barred in this case. Dr. Sprecher attempted to raise claims that trial counsel was constitutionally ineffective by failing

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[11] This case gives additional reason for concern regarding the Second Circuit's application of procedural bar principles to fundamentally important constitutional claims that require post-trial factual development of the record. The courts below found Petitioner's claims of government misconduct (specifically the withholding of information that Petitioner contended should have been produced at trial pursuant to *Giglio v. United States*, 405 U.S. 150 (1972)), to be procedurally barred, referring again (as it had in *Billy-Eko I*) to the Circuit's general rule of procedural bar for all constitutional claims not raised on direct appeal. See App., *infra*, at 16a, citing *Campino v. United States*, 968 F.2d 187, 190 (2d Cir. 1992). While the district court then purportedly considered the merits of the allegations, it did so on affidavits filed by the government and only after denying Dr. Sprecher the discovery that he sought and could have used to confront the government's affidavits and to support his claims.

to pursue whole areas of examination that were critically important to Petitioner's theory of the case, that trial counsel made various evidentiary errors, including the failure to object to inadmissible evidence, that trial counsel entered into various substantive stipulations that were against Petitioner's interests, and that trial counsel otherwise failed to make certain viable factual and legal arguments. In wholesale fashion, the district court found all of these claims to be procedurally barred solely because they related to matters in the record as opposed to "matter outside the record", (App., *infra*, at A10), and the Second Circuit affirmed.

There is no other Circuit in the country, including those that have developed a rule that is similar on its face to the rule developed by the Second Circuit in *Billy-Eko II*, that has accepted such a test for a procedural bar with respect to Sixth Amendment ineffective assistance claims. Each of the other Circuits focuses its inquiry on whether there are factual matters outside the record that could be developed in order to give relevant insight into the claims and which might explain the matters in the record in order to determine whether the acts or omissions at issue constituted ineffectiveness. See e.g. *Beaulieu v. United States*, 930 F.2d 805, 807-08 (10th Cir. 1991). Indeed, even the court in *Billy-Eko II* seemed to recognize this. *Billy-Eko*, 8 F.3d at 114, 116. The application of a procedural bar in the instant case to Dr. Sprecher's claims of ineffective assistance of counsel cannot be reconciled with the rules of procedural default developed by any other federal circuit court of appeals.[12] Each other

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[12] See e.g. *United States v. Mala*, 7 F.3d 1058, 1063 (1st Cir. 1993) ("We have held with regularity bordering on the monotonous that fact-specific claims of ineffective assistance cannot make their debut on direct review of criminal convictions, but, rather, must originally be presented to, and acted upon by, the trial court"; "To be sure, we have occasionally undertaken review of ineffective assistance claims on direct appeal, even without the advantage of the district court's view. But we travel this route only when the critical facts are not in dispute and the record is sufficiently developed to allow reasoned consideration of the claim.") (Citations omitted);

United States v. Nahodil, 36 F.3d 323, 326 (3d Cir. 1994) (2255 is the proper and preferred vehicle to allege ineffective assistance of counsel); *United States v. Matzkin*, 14 F.3d 1014, 1017 (4th Cir. 1994) (ineffective assistance of counsel claims are to be raised in 2255 petitions); *United States v. Stockstill*, 26 F.3d 492, 498 (4th Cir. 1994) (remanding for ineffectiveness claim to be treated as though at a 2255 hearing); *United States v. Lewis*, 902 F.2d 1176, 1180 (5th Cir. 1990) ("[A] claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court....") (quoting *United States v. Higdon*, 832 F.2d 312, 313-14) (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988); *United States v. Seymour*, 38 F.3d 261, 263 (6th Cir. 1994) (ineffectiveness claim is best brought in a 2255 petition and hearing); *United States v. Goodlet*, 3 F.3d 976, 980 (6th Cir. 1993) (ineffectiveness claim dismissed from direct appeal for insufficient record; 2255 is preferred course); *United States v. McNeely*, 20 F.3d 886, 889 (8th Cir. 1994) (declining to hear ineffectiveness claim; should be raised first on 2255); *McCumber v. United States*, 30 F.3d 78, 80 (8th Cir. 1994) (accord); *United States v. Schmidt*, 922 F.2d 1365, 1369-70 (8th Cir. 1991) ("This court has repeatedly declined to address [ineffectiveness] claims that are first raised in the appellate court on direct appeal."); *United States v. Blackman*, 961 F.2d 743, 748 (8th Cir. 1992) (record inadequate, review not proper until 2255 petition is litigated in district court); *United States v. Rewald*, 889 F.2d 836, 859 (9th Cir. 1989), amended, 902 F.2d 18, cert. denied, 111 S.Ct. 64 (1990); *Brechen v. Reynolds*, 41 F.3d 1343, 1363-64 (10th Cir. 1995) (Proper to bring ineffective claims on collateral attack for the first time); *Harris v. Champion*, 48 F.3d 1127, 1131-32 n.5 (10th Cir. 1995) (same); *United States v. Robertson*, 45 F.3d 1423, 1434-35 (10th Cir. 1995) ("We have consistently held that the preferred method for challenging the effectiveness of counsel is by collateral attack ...."); *United States v. Butler*, 41 F.3d 1435, 147 n.1 (11th Cir. 1995) (ineffectiveness claims are properly raised in 2255 petitions); *United States v. Arango*, 853 F.2d 818, 823 (11th Cir. 1988) (ineffective assistance claims may only be brought on collateral attack).

While the Seventh Circuit is, of course, in accord with all of the other Circuits as to the general rule, see e.g., *Bond v. United States*, 1 F.3d 631 (7th Cir. 1993); *United States v. Taglia*, 922 F.2d 413, 418 (7th Cir.), cert. den. sub nom., *McDonnell v. United States*, 500 U.S. 927 (1991), the open and energetic debate over this issue between Judges Posner and Easterbrook highlights the significance of the issue and provides additional support for granting this Petition to provide guidance to the lower courts. See *Guinan v. United States*, 6 F.3d 468 (7th Cir. 1993).

Circuit would have **required** such claims to be brought on collateral attack. The decision in Dr. Sprecher's case reflects the Second Circuit's latest position on this matter.[13] It is respectfully urged that this Court must take the appropriate step to correct this decision and to provide for consistency among the Circuits on this fundamentally important and constantly recurring issue.

II. THE DECISION BELOW REFLECTS AN ERRONEOUS DECISION ON A FUNDAMENTALLY IMPORTANT RECURRING LEGAL ISSUE

The most basic reason why the decision below is a clearly erroneous decision is that the district court that applied the procedural bar to Dr. Sprecher's claims of ineffective assistance of counsel is the very same district court that advised him during his presentence conference on May 28, 1992, that he could wait to raise his claims challenging his trial counsel's performance in a 2255 petition.[14] At a minimum, this undercuts the Second Circuit's view that the rules it has developed provide "clear" guidance. The Petitioner should not be barred from bringing claims he brought through the very vehicle he was advised to bring them in by the district court.

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[13] It appears that the decision below was the next logical step on the continuum for the Second Circuit. The Circuit went from *Campino v. United States*, 968 F.2d 187 (2d Cir. 1992) which called for a procedural bar for all constitutional claims not raised on direct appeal, to *Billy-Eko I*, which applied *Campino* to ineffective assistance of counsel claims, to *Billy-Eko II*, which, on compulsion from this Court, established a position more in line with other Circuits, to now moving back toward *Campino*, under the auspices of the *Billy-Eko II* "exception". The "exception" for a "narrow category of cases" is the rule in the Second Circuit if the kinds of claims Dr. Sprecher raised can be found to be procedurally barred. Compare, *Douglas v. United States*, 13 F.2d 43 (2d Cir. 1993).

[14] This can be found in the transcript from the May 28, 1992 presentence proceedings and it is acknowledged by the government in a memorandum the government filed below, set forth at page 311 of the Joint Appendix filed in the Second Circuit.

More significantly to the question herein presented is the inescapable conclusion that it simply is wrong to procedurally bar a claim from being brought for the first time on collateral review when such claim inherently requires factual and evidentiary development that is not possible on the initial direct appeal. The ineffective assistance of counsel ramifications of matters that occurred at trial may not be at all apparent from the bare record to new appellate counsel and such counsel would have no opportunity to place in the record on appeal any facts or other information he ascertains which support the claim that certain acts or omissions of trial counsel constituted ineffectiveness. The rationale of the cases from each Circuit cited above expressly recognizes these principles. This is especially so with respect to the nature of the claims Dr. Sprecher raised below.

It is a universally recognized principle that a trial judge is best situated to consider counsel's trial performance and the impact of evidentiary and other deficiencies claimed by the defendant; but the procedural bar rules applied here would require an appellate court to make such an evaluation without the benefit of either party's illustrative input and argument on the issues and without the trial judge's first-hand impressions. See *Guinan v. United States*, 6 F.3d 468, 473 (7th Cir. 1993) (Easterbrook, J., concurring).

Additionally, as the Solicitor General noted in *Billy-Eko II* before this Court, requiring a defendant or appellate counsel to determine whether to raise claims of ineffective assistance of counsel on direct appeal without the benefit of any factual development is confusing and results in an unworkable rule. See *Billy-Eko*, 8 F.3d at 115.

Claims like those barred below require context for their evaluation. That context is only possible through an evidentiary hearing. When a defendant claims that it was counsel's omissions that constituted ineffective assistance, it would be the truly rare case in which an evaluation of such a claim could be made from the record. The defendant ought to be given the opportunity to examine trial counsel on the matter and to submit factual materials and legal argument that would demonstrate the unreasonableness of such

omissions and the adverse impact they had. When the defendant bases her claims on acts of counsel, she ought to be able to make an evidentiary showing as to why these acts were unreasonable, either in contrast with alternatives or otherwise. Clearly, the defendant would not have had an opportunity to make such a showing during the trial in the ordinary case. In the case in which conflicts of interest between counsel and client developed during the trial and an evidentiary hearing was held either during or after the trial, the issue might well be one conducive to review on direct appeal; but such claims of conflict of interest are of a very different nature.[15] Certainly, a defendant is better situated to determine whether, during the trial, there is an antagonism with trial counsel than he is to evaluate evidentiary decisions, decisions about whether to enter into stipulations, and decisions about what avenues of examination to pursue, object to, or forego. The latter is the nature of the claims Dr. Sprecher tried to bring in his 2255 petition; but he found them barred. New appellate counsel could do nothing with such claims without the opportunity to make an evidentiary showing of why, given the existence of non-record facts and information, trial counsel's performance in these regards was ineffective. That opportunity could only be afforded in the trial court.

Finally, the decision below is erroneous because the test enunciated for the application of a procedural bar to such claims is wrong as a matter of law, even under the Second Circuit's decision in *Billy-Eko II*. The district court formulated the test as the following: "Under *United States v. Billy-Eko*, (sic) 8 F.3d 111, 115 (2d Cir. 1993), when a petitioner has been represented on appeal by a lawyer other than his trial attorney, a post-appeal attack on the conviction based on ineffective assistance of trial counsel **is limited to matters outside the trial record**." (App., *infra*, at A10) (Emphasis added). This formulation is absolutely wrong. The test even under *Billy-Eko*

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[15] See e.g., *United States v. Levy*, 25 F.3d 146 (2d Cir. 1994); *United States v. Fulton*, 5 F.3d 605 (2d Cir. 1993).

II is not and cannot be whether the attack is directed to matters found in the record or outside of the record; it is whether there is a sufficiently developed factual trial record concerning the claims made in order to allow a reviewing court fully to evaluate the claims. *Billy-Eko*, 8 F.3d at 115. Moreover, the *Billy-Eko II* court and every other court has noted the special inappropriateness of applying a procedural bar to evidentiary type ineffectiveness claims. *Id.*

Petitioner submits that a reading of Judge Easterbrook's concurring opinion in *Guinan v. United States*, 6 F.3d at 476, sets out the current dilemma and supports the granting of this Petition. Judge Easterbrook wrote the following:

> Lawyers who raise ineffective-assistance of counsel claims on direct appeal do their clients a grave disservice, because the inevitable loss will prevent the accused from raising the same claim later, when factual development would permit accurate resolution. Lawyers who do not raise ineffective-assistance claims on direct appeal create a risk that the court will deem the contention forfeited.... Litigants and judges will, however, have to devote their scarce time to working through the complex rules that permit this adjudication. I would take Occam's Razor and slice off the wasted motion.[16]

For all of the foregoing reasons, and based on the rationale behind the preference for raising ineffective assistance of counsel claims on collateral attack, it is respectfully submitted that the decision below was erroneously decided and, because it deals with a fundamentally important and constantly recurring constitutional

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[16] This is consistent with the Eleventh Circuit's position as set forth in *United States v. Arango*, 853 F.2d 818, 823 (11th Cir. 1988) (Sixth Amendment ineffective assistance of counsel claims may be brought only on collateral review).

issue, this Court ought to grant this Petition and vacate the judgment below.

III. THE FINDING BELOW THAT PETITIONER WAIVED HIS CONSTITUTIONAL RIGHT TO TESTIFY WAS AN ERRONEOUS DECISION ON AN IMPORTANT ISSUE

In his 2255 petition, Dr. Sprecher raised a claim that he was denied his right to testify on his own behalf when his lawyer threatened to withdraw if he insisted on testifying.[17] Relying on , *Nichols v. Butler*, 953 F.2d 1550 (11th Cir. 1992) (*en banc*), Dr. Sprecher argued that this threat by trial counsel constituted ineffective assistance of counsel and the denial of his rights under the Fifth and Sixth Amendments to testify on his own behalf at trial.

The district court's factual findings on the issue are a bit sketchy; but they suffice to present the issue. In response to Dr. Sprecher's assertion that trial counsel threatened to withdraw if he testified, the court asked counsel his recollection. Trial counsel acknowledged that, while he did not remember "going that far," he "might" have done so. (App., *infra*, at A12). The district court apparently attempted to distinguish *Nichols* based on the assumption that Dr. Sprecher was aware that he had the right to testify and that trial counsel testified that their arguments on the subject ended with Dr. Sprecher saying something like "you're the lawyer, you make the decision." *Id.* Neither the fact that their arguments ended in such a manner nor the proposition, if accurate, that the Petitioner knew he had the right to testify is relevant to Dr. Sprecher's claim. Certainly, neither fact could be dispositive; yet that is how the courts below resolved the matter. Clearly, neither fact would diminish the coercive effect of counsel's threats on Petitioner's decision as to

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[17] There is no indication in the record or in the court's decision that this threat was motivated by any concern by counsel that Petitioner might commit perjury if he testified. See *Nichols v. Butler*, 953 F.2d 1550, 1556 n.7 (11th Cir. 1992) (*en banc*). Petitioner readily acknowledges that he does not have the right to commit perjury. *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

whether to exercise his right, assuming *arguendo* he knew he had such a right. The threat, in effect, transfers what is **the client's** fundamental and personal constitutional right, *United States v. Teague*, 953 F.2d 1525 (11th Cir.) (*en banc*), cert. denied, — U.S. —, 113 S.Ct. 127, 121 L.Ed.2d 82 (1992), to the lawyer.[18]

The court below accepted that trial counsel may have threatened to withdraw if Dr. Sprecher insisted on testifying; but found such coercion of no special consequence. With all due respect, for the reasons set forth in *Nichols*, Petitioner submits that this is an erroneous decision which conflicts with the Eleventh Circuit's decision in *Nichols* and which has ramifications for a fundamentally important constitutional right to such a degree that it is appropriate for this Court to review the matter.

As the court in *United States v. Teague*, 953 F.2d at 1532, held, the right of a criminal defendant to testify on his own behalf is a **fundamental** constitutional right that is personal to the defendant and which cannot be waived by the trial court or by defense counsel. See *Nichols*, 953 F.2d at 1552. Where the defendant claims his attorney, through coercion or otherwise, deprived him of his right, the analysis of the issue is under the ineffective assistance of counsel framework. *Id; United States v. Moskovits*, 815 F.Supp. 147, 153 n.14 (E.D. Pa 1993). An attorney's performance is constitutionally deficient if he fails to ensure his duty to protect the defendant's right to testify and to make certain that the client knows that the decision exclusively is his to make, with the benefit of advice, but free from coercion. *Id.* As the court in *Nichols* wrote, "[I]t is beyond question that an attorney cannot threaten to withdraw during a trial in order

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[18] To the extent the government contends and the court's decision below was based on the proposition that Dr. Sprecher's failure to insist on his right in open court and to object to trial counsel's threats openly ought to be deemed a valid waiver of the right to testify, such a position should be rejected out of hand. *United States v. Vargas*, 920 F.2d 167, 170 (2d Cir. 1990), cert. denied sub nom., *Duluc del Rosario v. United States*, 502 U.S. 826, 112 S.Ct. 93 (1991).

to coerce the defendant to relinquish his fundamental right to testify." *Id.* "Of course, counsel should advise his client in the strongest terms possible if he feels that it would be unwise for the client to testify. However, to coerce the client into remaining silent by threatening to abandon him mid-trial goes beyond the bounds of proper advocacy." *Id.* "Where a trial has already begun, the risk of prejudice to the client from withdrawal of counsel is significant." *Id.* Trial counsel here put Dr. Sprecher in an untenable situation.[19]

By coercing Dr. Sprecher into foregoing the opportunity to testify on his own behalf, trial counsel deprived Dr. Sprecher of perhaps "the most important witness" he could have had. *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S.Ct. 2704, 2709, 97 L.Ed.2d 37 (1987). Dr. Sprecher was uniquely situated to put forward his defense and explain the complicated transactions which formed the basis of the charges against him. He also forcefully could have described the tactics used by those who became government witnesses against him. Clearly, this could have had a dispositive effect on the outcome.

For all of the foregoing reasons, it is respectfully submitted that the court below erroneously decided this fundamentally important constitutional issue. The issue is sufficiently important for this Court to grant review and to establish a rule of law to apply uniformly in criminal cases. The right of a criminal defendant to testify on his own behalf is, of course, at issue in every criminal case and this

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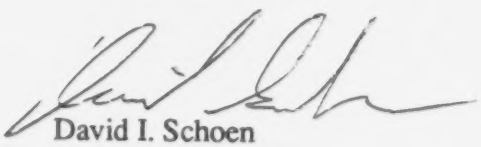
[19] Dr. Sprecher alleged in his petition that counsel's coercion regarding the right to testify was also linked to counsel's persuasion that he should accept a bench trial as opposed to a jury trial. In rather peculiar reliance on the procedural bar rule in *Billy-Eko II*, as this court interpreted it, the court held such a claim to be procedurally barred, finding that the record "refuted" such a claim. (App., *infra* at A12). The court then went on to discuss the issue, focusing on impressions trial counsel claimed to have about Dr. Sprecher's limitations. It is not difficult to conceive of factual development not in the trial record that would have been critical to fairly adjudicating this issue. The application of the procedural bar was erroneous.

Court ought to reaffirm its fundamental sanctity by granting review in this case and establishing a bright-line rule.

CONCLUSION

For the reasons hereinabove set forth, Petitioner respectfully submits that this Petition for a writ of certiorari should be granted.

Respectfully submitted,



David I. Schoen
Counsel of Record
2800 Zelda Road
Suite 100-6
Montgomery, Alabama 36106
(334) 272-4443

Dated: July 14, 1995

APPENDIX

APPENDIX A

JON/SDNY
90cr23
Cedarbaum

United States Court Of Appeals

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of February, one thousand nine hundred and ninety-five.

PRESENT: HONORABLE JON O. NEWMAN, Chief Judge.
HONORABLE JAMES L. OAKES,
HONORABLE RICHARD J. CARDAMONE,
Circuit Judges.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED FEB 15 1995
GEORGE LANGE III, CLERK/stamp

BENJAMIN G. SPRECHER,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

94-2175

ORDER

Appeal from the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by appellant *pro se* and by counsel for appellee.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court be and it hereby is AFFIRMED.

Benjamin G. Sprecher, a federal prisoner, appeals *pro se* from tho March 29, 1994, order of the District Court, denying Sprecher's motion for post-conviction relief pursuant to 28 U.S.C. §2255 (1988).

On January 9, 1992, Sprecher was convicted, after a bench trial, of securities fraud and related offenses. *United States v Sprecher*, 783 F. Supp. 133 (S.D.N.Y. 1992). On direct appeal, this Court affirmed the conviction but remanded for resentencing, *United States v Sprecher*, 988 F. 2d 318 (2d Cir. 1993), and, following resentencing, an amended judgment of conviction was entered on March 13, 1993.

In this section 2255 motion, Sprecher contends that his conviction was tainted by unconstitutional misconduct by the Government and by ineffective assistance of defense counsel. Sprecher also contends that his sentence was improperly calculated. The District Court held an evidentiary hearing relating to several of Sprecher's allegations of prosecutorial misconduct and ineffective assistance of counsel. In its opinion and order denying Sprecher's motion, this District Court concluded that each of Sprecher's constitutional claims was either procedurally barred or without merit and that there was no basis for reconsidering Sprecher's sentence. On appeal, Sprecher challenges each of tho District Court's determinations, and further contends that the procedures employed in the District Court denied him due process of law.

Of Sprecher's numerous claims, only that relating to alleged conflicts of interest of his trial attorney, Ivan Fisher, requires further discussion. Sprecher alleges that Fisher was burdened by conflicts of interest resulting from his prosecution by the United States Attorney for the Eastern District of New York for tax-related offenses and from disciplinary action pending before state bar authorities. Sprecher also contends that he would not have retained Fisher had known of these facts. After hearing evidence on this issue, the District Court concluded that Sprecher knew of Fisher's alleged conflicts. The District Court also concluded that any possible conflict had not adversely affected Fisher's representation of Sprecher.

Initially, we note that at the time of Sprecher's trial, neither the trial court nor the United States Attorney for the Southern District had reason to know of these alleged conflicts, because they arose out of the prosecution and disciplining of Fisher by state authorities and by federal authorities in another District. Therefore, the trial court was under no duty to inquire into these alleged conflicts or to consider disqualifying Fisher or seeking a waiver from Sprecher, and there is thus no cause for reversal solely because the trial judge made no inquiry. *See United State v. Levy*, 25 F.3d 146, 152-54 (2d Cir. 1994).

At the same time, the trial court's lack of information about Fisher's alleged conflicts effectively prevented it from following procedures that might have resulted in a knowing and intelligent waiver by Sprecher of his right to a defense attorney unburdened by conflicts. *See Levy*, 25 F.3d at 154-55, 158; *United States v. Iorizzo*, 786 F.2d 52, 58-59 (2d Cir. 1986); *United States v. Curcio*, 680 F.2d 881, 888-91 (2d Cir. 1982). In considering Sprecher's section 2255 motion, the District Court placed emphasis on its finding that Fisher had in fact explained the alleged conflicts to Sprecher before undertaking his representation of him. However, we have cautioned against relying upon the very attorney whoso capacity to act in the defendant's interest is open to question to fully explain the scope and ramification of potential conflicts to the defendant. *See Levy*, 25 F.3d at 158-59; Iorizzo, 786 F.2d at 59. Moreover, the record here

does not support the conclusion that Fisher fully and clearly apprised Sprecher of the potential implications either of the alleged conflicts or of a waiver. Therefore, in the absence of an on-the-record waiver, we must consider whether Fisher's alleged conflicts denied Sprecher effective assistance of counsel *See Levy*, 25 F. 3d at 155.

The prosecution and disciplinary hearings against Fisher did not create an actual conflict of interest, becaus they did not cause Fisher's and Sprecher's interests to diverge during the course of the representation, *see id.* at 155. Fisher's sentencing in the Eastern District was completed before he was retained by Sprecher; therefore, Fisher could not reasonably have believed that he had an interest in tempering Sprecher's defense in order to curry favor with the prosecution, *see id.* at 156. Although the state disciplinary proceedings, which grew out of the federal charges, appear to have taken place during Fisher's representation of Sprecher, Fisher could not reasonably have believed that he might be sanctioned by state bar authorities if he zealously defended his client In a federal prosecution. At most, then, Fisher labored under potential conflicts of interest. But for a potential conflict of interest to result in constitutionally ineffective assistance of counsel, the defendant must show that the conflict resulted in prejudice, *see id.* at 152, 155, that is, that there is a reasonable probability that the result of the proceeding would not have been this same in the absence of the potential conflict, *see Strickland v. Washington*, 466 U.S. 668, 694 (1984). In view of the District Court's finding that Fisher was an intelligent and diligent advocate for Sprecher and that he repeatedly challenged the Government, there is no basis for concluding that Sprecher might have been acquitted had Fisher not been faced with these alleged conflicts. Finally, because Fisher's representation of Sprecher was constitutionally adequate, Sprecher's allegation that he would not have retained Fisher had he known of these difficulties, even if true, does not present a basis for disturbing his conviction.

We have carefully considered Sprecher's other arguments and find them to be without merit.

The order of the District Court is affirmed.

Jon O. Newman/signature
Chief Judge.

James L. Oakes/signature

Richard J. Cardamone/signature
Circuit Judges.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT/stamp

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

SDNY
90-cr-234
Cedarbaum, J.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Court House in the City of New York, on the 16 day of March one thousand nine hundred and ninty-five.

94-2175

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED MAR 16 1995
GEORGE LANGE III, CLERK/stamp

Present: Hon. Jon O. Newman,
Chief Judge.
Hon. James L. Oakes,
Hon. Richard J. Cardamone,
Circuit Judges.

Benjamin G. Sprecher,

Petitioner-Appellant,

v.

United Staes of America,

Respondent-Appellee.

A petition for rehearing having been field hereinb by appelant pro se Benjamin G. Sprecher,

Upon consideration thereof, it is

Odered that said petition be and it hereby is DENIED.

GEORGE LANGE III, CLERK

By: Carolyn Clark Campbell/signature
Carolyn Clark Campbell,
Chief Deputy Clerk

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against -

BENJAMIN G. SPRECHER,

Defendant.

MEMORANDUM OPINION AND ORDER
(S3) 90 Cr. 234 (MGC)

APPEARANCES:

BENJAMIN G. SPRECHER
Pro-Se
29228-054 Unit B
F.P.C. McKean
P.O. Box 9000
Bradford, PA 16701-0990

MARY JO WHITE
United States Attorney for the Southern District of New York
Attorney for the United States of America
One St. Andrew's Plaza
New York, NY 10007
By: John W. Auchincloss II
Assistant United States Attorney

CEDARBAUM, J.

Following a non-jury trial in 1991 Benjamin G. Sprecher was convicted of conspiring to defraud the United States, making false statements to a government agency, perjury, and obstruction of

justice. *United States v. Sprecher*, 783 F. Supp. 133 (S.D.N.Y. 1992). His conviction was affirmed on appeal. *United States v. Sprecher*, 988 F.2d 318 (2d Cir. 1993). Familiarity with those decisions and the extensive record in this action is assumed.

Sprecher now brings various post conviction motions attacking both his conviction and his sentence. Sprecher's motion attacking his conviction is in the nature of a petition for habeas corpus pursuant to 28 U.S.C. §2255. Sprecher's request for reconsideration of sentence is most analogous to a motion under Fed. R. Crim. P. 35(c). An evidentiary hearing was held on February 10, 1994 to consider some of the issues raised by Sprecher's petition. For the reasons discussed below, all of Sprecher's requests for relief are denied.

DISCUSSION

Sprecher argues that his conviction is unconstitutional in two ways. He argues that his retained counsel did not provide him with effective assistance of counsel, and that the Government engaged in a pattern of misconduct sufficiently serious to invalidate his conviction. These contentions are discussed separately.

1. Ineffective Assistance of Counsel

A defendant alleging ineffective assistance of counsel must demonstrate both that his attorney's representation was unreasonable under the "prevailing professional norms," *Strickland v. Washington*, 466 U.S. 668, 688 (1984) and that but for the attorney's actions, there is a reasonable probability that "the result of the proceeding would have been different." *Id.* at 694; *see United States v. Javino*, 960 F.2d 1137, 1145 (2d Cir. 1992), *cert. denied*, __ U.S. __, 113 S.Ct. 477 (1992). A court considering a claim of ineffective assistance must take care not to be deceived by "the distorting effects of hindsight," *Strickland*, 466 U.S. at 689. "Actions or omissions by counsel that might be considered sound trial strategy do not constitute ineffective assistance." *Javino*, 960 F.2d at 1145 (internal quotations and citations omitted).

Not all of Sprecher's allegations of ineffective assistance of counsel may be raised in a §2255 petition. Under *United States v. Billy-Eko*, 8 F.3d 111, 115 (2d Cir. 1993), when a petitioner has been represented on appeal by a lawyer other than his trial attorney, a post-appeal attack on the conviction based on ineffective assistance of trial counsel is limited to matters outside the trial record. Sprecher's allegations that he was denied effective assistance because his attorney agreed to certain .stipulations, failed to ask certain questions, did not make certain objections, did not make certain motions, and did not make particular arguments regarding evidence actually admitted at trial are procedurally barred. Moreover, even if these allegations could be raised, they would fall under the heading of "trial strategy" and would not support a constitutional claim of ineffective assistance. *See Michel v. Louisiana*, 350 U.S. 91, 101 (1955); *Javino*, 960 F.2d at 1145. Of Sprecher's allegations which are cognizable under *Billy-Eko*, only three present substantial issues.

A. Alleged Conflict of Interest

Sprecher was represented at trial by Ivan S. Fisher. In the year prior to being retained by Sprecher, Fisher had pled guilty to and had been sentenced on three misdemeanor tax charges. While Sprecher's trial was proceeding, state disciplinary proceedings were pending against Fisher. Sprecher alleges that Fisher never revealed his legal difficulties, and that had he known of Fisher's situation, he would not have retained him. Sprecher further alleges that Fisher's representation was defective because the pendency of state disciplinary proceedings gave Fisher an incentive to curry favor with the Government.[1]

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[1] For example, Sprecher alleges: "If these facts were revealed to [me], [I] would not have retained Fisher and, obviously, would have considered Fisher's action in a different light. Fisher's lack of any meaningful work and his acquiescence to delays is readily understandable in light of his concern with his own position, as was his refusal to engage in any actions which would tend to embarrass the

Because of conflicting affidavits, an evidentiary hearing was held on this claim. Fisher testified at the hearing that he was certain that he had discussed his legal difficulties with Sprecher several times. In addition, Sprecher's co-defendant, Alexander Novak, testified that he was aware of Fisher's situation because on Fisher's recommendation he had retained for his own representation the attorney who was representing Fisher in the disciplinary proceeding. Novak also testified that he had discussed Fisher's situation with Sprecher. In contrast, Sprecher testified that while he may have been vaguely aware that Fisher had certain legal problems, Fisher never specifically discussed them, and that he remains unaware of their full nature and scope. After listening to the testimony and observing the demeanor of the witnesses, I find that Fisher and Novak were extremely credible witnesses and that their testimony was truthful. I find that Sprecher was aware of Fisher's legal predicament, and that his testimony that he would not have retained Fisher if he had had more information is unworthy of belief.

Nor is there any merit in Sprecher's allegation that Fisher pursued anything less than a vigorous defense because he feared Government retaliation. Throughout the trial Fisher was an intelligent and diligent advocate for his client. He repeatedly challenged the government. Fisher's statement in an affidavit that, "During my representation of Dr. Sprecher at no time did I feel intimidated or in any way reluctant to pursue any legitimate course that I felt was consistent with Dr. Sprecher's best interests" is fully consistent with the trial record and my observations of Fisher during the entire course of the proceedings.[2]

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prosecutor." First Sprecher Affidavit at 13.

[2] In responding to Sprecher's initial motion the government read some of his arguments as an allegation that Fisher was cooperating in the prosecution of other individuals. In his reply affidavit Sprecher states that he never "implied" such an allegation. Third Sprecher Affidavit at 17.

B. Alleged Denial of the Right to Testify

Sprecher alleges that Fisher somehow "prevented" him from testifying. He relies on *Nichols v. Butler*, 953 F.2d 1550, 1553 (11th Cir. 1992) where the Eleventh Circuit held that an attorney's threat to withdraw during trial if the client insisted on testifying constituted ineffective assistance of counsel. The *Nichols* court held that reversal was required because, in effect, the defendant had been forced to choose between his constitutional right to counsel and his constitutional right to testify. *See* 953 F.2d at 1552-54. Sprecher was not presented with such a choice.

At the hearing, Fisher was asked if he ever threatened to withdraw. Fisher said that he and Sprecher had many heated discussions about whether Sprecher should testify and that while it is possible he might have said such a thing in the heat of the moment, he does not remember "going that far." Hearing Tr. at 37. Fisher testified that these discussions always concluded with Sprecher saying something like, "you're the lawyer, you make the decision." I find Fisher's testimony on this point extremely credible. He spoke carefully and deliberately and it was evident that he was doing his best accurately to recall what had occurred.

This is not a case where a defendant was unaware that he had a right to testify. *See, e.g., Foster v. Delo*, 11 F.3d 1451 (8th Cir. 1993) (defendant received ineffective assistance when counsel never informed him of his right to testify). Sprecher clearly knew that he had a right to testify. Sprecher's situation is analogous to *United States v. Aguirre*, 912 F.2d 555, 562-63 (2d Cir. 1990). In that case, the lawyer informed his client of his right to testify, the client listened "intently," and the client ultimately "assented" to his lawyer's advice that he not take the stand. The Second Circuit rejected the client's claim of ineffective assistance of counsel.

Sprecher also argues that his decision not to testify was improperly linked to his decision to waive a jury trial. This assertion is refuted by the record, and therefore barred by *Billy-Eko*, but for completeness, I will address it briefly. At a pre-trial hearing on October 4, 1991, Fisher first raised the possibility of a bench trial.

At that hearing, Fisher listed several reasons why he and his client believed that it was in Sprecher's best interests to waive a jury: that a jury might not be able to follow complicated evidence in a securities case; that a jury might not be able to apply particular evidence only to the appropriate counts of the indictment; that Sprecher might not be able to restrain himself from acting out in front of the jury; and, that if Sprecher testified he could get a fairer hearing from a judge than from a jury. On October 11, 1991, Sprecher stated in open court that he had carefully considered the advantages and disadvantages of proceeding without a jury and that he desired to do so. He signed a written waiver that explicitly states that he was waiving his right to a jury at his own request. The record is clear, therefore, that the possibility that Sprecher might testify was only one of several factors that went into his decision. Nor is there any indication that there was any formal link between the jury waiver and whether Sprecher should testify at trial.

C. Alleged Failure to Call Known Witnesses

Sprecher alleges that Fisher's representation was deficient because he failed to interview and call various potential witnesses. Failure to interview a known witness can constitute ineffective assistance of counsel, but the failure must be of such magnitude that it satisfies the two-pronged *Strickland* test. *See United States v. Nersesian*, 824 F.2d 1294, 1321 (2d Cir. 1987), *cert. denied*, 484 U.S. 957 (1987) (applying *Strickland* to a variety of claims, including allegation that attorney failed to call witnesses); *see also United States v. Varqas*, 920 F.2d 167, 169-70 (2d Cir. 1990), *cert. denied*, U.S., 112 S.Ct. 93 (1991) (in order to constitute ineffective assistance decision not to call particular witnesses must be "unreasonable"). Sprecher does not meet this standard.

Sprecher alleges that it was error for Fisher not to call as witnesses at trial persons who would have testified to KKP's charitable function, First Sprecher Affidavit at 14; Chaim Levy, *id.* at 2 & 16; Solomon Rosengarten, *id.* at 12; Mark Engel and Thomas Valerie, *id.* at 20; Beatriz Ortega, *id.* at 21 & 41; Toby Polansky, *id.* at 21; Craig McCullough, *id.* at 21 & 22; Connie Schiedel, id. at 24; Harold

House, id. at 25-27; Joseph Morgenstern, id. at 28; Alexander Igdalski, id. at 28; and Stephen Hoffenberg, *id.* at 35. Sprecher also argues that it was error not to call Louis Foti as a witness at the *Hammad* hearing. First Sprecher Affidavit at 32. I have examined each of these contentions in detail and find that they are without merit. None of the potential witnesses Sprecher cites could have provided significant evidence on any of the central issues. A §2255 petition is not the appropriate vehicle by which to re-raise issues that should have been argued at trial or on direct appeal. Read together, Sprecher's voluminous submissions amount to little more than an argument that his attorney should have presented his defense in a different way. That clearly falls under the rubric of trial strategy, precisely the type of allegation that does not constitute a constitutional claim of ineffective assistance of counsel. Even taken as a whole, all of Sprecher's allegations do not give rise to an inference that Fisher's representation was unreasonable under the "prevailing professional norms," *Strickland v. Washington*, 466 U.S. 668, 688 (1984) or that but for Fisher's actions there is a reasonable probability that "the result of the proceeding would have been different." *Id.* at 694; *see United States v. Javino*, 960 F.2d 1137, 1145 (2d Cir. 1992).

2. Alleged Government Misconduct

Most of Sprecher's allegations of government misconduct are procedurally barred. None of them was raised on direct appeal and in order to raise them now he must demonstrate both "cause and prejudice." *Campino v. United States*, 968 F.2d 187, 190 (2d Cir. 1992). Nevertheless, given the seriousness of Sprecher's allegations, I will briefly consider them in order to insure that no fundamental miscarriage of justice has occurred. *See Coleman v. Thompson*, U.S., 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991) (petitioner bringing procedurally defaulted claims who cannot establish cause and prejudice must demonstrate "that failure to consider the claims will result in a fundamental miscarriage of justice.")

Sprecher alleges that the government failed to turn over materials as required by *Brady v. Maryland*, 373 U.S. 83 (1963), and 18 U.S.C. §3500 with respect to three witnesses, Carol Bernard, James Bullard, and Louis Foti. He also alleges that the government knowingly permitted Bernard and Foti to commit perjury. These allegations are without merit.

A. Carol Bernard

On direct examination Bernard testified that she had a "problem" with the NASD. Trial Tr. 95-96. She testified that on Sprecher's advice she telephoned the NASD and learned that she had been fined, but that she never received formal notification because the NASD had mailed materials to the wrong address. She added that after learning this, she left the securities business. Sprecher argues that the government knew that this testimony was false because it knew that Bernard had been not only fined but also barred from the securities industry. He asserts that computer records would support his allegations. They do not. The government has provided an excerpt of records in the NASD's Central Registration Depository System which indicate that Bernard "was permitted to resign."

B. James Bullard

Bullard testified about a meeting at Laguardia Airport. Sprecher argues that the government was aware that another participant in the meeting, Harold House, had taken contemporaneous notes and that it should have provided them as a possible source of impeachment evidence. Sprecher argues that it was improper for the government not to turn over House's notes. The government was not required to produce these notes as 3500 material since House did not testify at trial. Sprecher submitted an affidavit of House. But that affidavit does not provide any basis for believing that House's notes contain any exculpatory material.

C. Louis Foti

Sprecher's most elaborate allegations concern Louis Foti, a cooperating accomplice witness. At trial, Foti admitted to an

extensive history as a "con man" who specialized in securities swindles. In 1988, Foti entered into a cooperation agreement with the United States Attorney's office for the Southern District of New York. In 1989 and 1990, while he was cooperating (but unbeknownst to the government), Foti undertook a scheme to sell unregistered stock to the public. On March 1, 1990 in Salt Lake City, Foti met with a man he knew as Sherman Thomas in connection with the scheme. At the end of the meeting "Thomas" informed Foti that he was really FBI special agent David G. McLean. McLean never arrested Foti, but he did ask Foti if he would cooperate and Foti agreed. McLean then debriefed Foti and Foti made a tape-recorded telephone call to Sprecher. Sprecher makes two arguments based on this incident.

First, Sprecher contends that the government should have provided a tape recording of Foti's debriefing by McLean and the written cooperation agreement that Foti entered into with authorities in Utah. I am satisfied that neither ever existed. The government has submitted affidavits from McLean and Special Assistant United States Attorney Mary Beth Walz. McLean states that he did not tape record his interview with Foti, and that not doing so was standard FBI procedure. Walz states that her office did not enter into a formal cooperation agreement with Foti until March 12, 1992, after Sprecher's trial. Both McLean and Walz state under oath that after learning that Foti was cooperating with the United States Attorney's office in New York, they adopted a "wait and see posture" about whether to prosecute Foti, and that they had little contact with him for several months.

Sprecher's suspicions appear to be the result of a misunderstanding. His assumption that there is a tape recording of Foti's debriefing is based on the following excerpt from McLean's testimony before a grand jury in Utah where he was questioned by Walz regarding Foti:

> Q: Mr. McLean, is it the practice of the F.B.I. that it tapes all of the conversations?
>
> A: Absolutely.

In his affidavit, McLean explains that he meant that it is FBI policy to record all conversations between an undercover agent and his targets. He states that he did not intend to suggest that it is FBI policy to record all interviews with confidential informants. Sprecher's second contention concerns the effect of Foti's attempted stock swindle in Utah on his cooperation with the United States Attorney's office in New York. In substance, Sprecher alleges that the possibility that Foti might be prosecuted for crimes in Utah gave prosecutors additional leverage over him because these activities were not covered by his formal cooperation agreement at the time he testified. Sprecher relies primarily on *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991), *cert. denied*, U.S. , 113 S.Ct. 2414 (1993), *DuBose v. Lefevre*, 619 F.2d 973 (2d Cir. 1980) and *United States v. Butler*, 567 F.2d 885 (9th Cir. 1978). In each of those cases reversal was warranted when it was demonstrated that the government was aware that a witness testified falsely. In *DuBose* and *Lefevre* the false testimony concerned the nature of the witnesses cooperation agreement with the government.

Sprecher argues that Foti testified falsely about what had happened in Salt Lake City and the details of his relationship with the government. A thorough examination of Foti's trial testimony does not support an inference that he testified falsely.

Initially, Sprecher attacks Foti's statement that he was never arrested in Utah. However, McLean has submitted an affidavit that says Foti wasn't arrested and there is nothing before the court that suggests he actually was. Sprecher also attacks Foti's statement that "he had nothing to lose" by testifying truthfully. First Sprecher Affidavit at 51. Foti's actual testimony was that "it is of no benefit to me to lie." Trial Tr. at 588. There is nothing before the court that supports an inference that the government told Foti that he would benefit from testifying falsely.

Nor is Sprecher's argument persuasive that Foti was lying when he testified that he was never told by anyone in the government that he had violated the law in Utah. Foti did answer "No" to the question, "No one ever in the government said to you, you know something,

you violated the law in Utah, that was a separate thing, you can be prosecuted for it? No?." However, read in context, it is clear that Foti is testifying about whether a specific Assistant United States Attorney told Foti that at a specific time.[3] More importantly, Foti clearly testified elsewhere that he was aware that he was at risk of being prosecuted.[4] Foti's testimony was not clearly false and it provides no basis for setting aside Sprecher's conviction.

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[3] The entire exchange reads as follows:

Q: Well, Mr. Zinger at that point told you not to bother responding to the inquiries from the people who had dealt with you in undercover capacities in Utah, didn't he?

A: He told me if they called just refer any calls to him.

Q: Just refer them to him?

A: Right.

Q: This thing was being handled right from here, Southern District?

A: Right.

Q: Now what was your understanding about being charged for your crimes in Utah?

A: It never came up.

Q: No one ever in the government said to you, you know something, you violated the law in Utah, that was a separate thing, you can be prosecuted for it? No?

A: No. Zinger initially said, but I think this is before he knew the facts, that he didn't know what I did wrong, but I think that's before he knew all the facts.

Trial Tr. 704-05.

[4] Shortly before the testimony quoted in footnote 3, Foti testified as follows:

Q: Now, after you were surprised in March of 1990 by the FBI?

THE SENTENCE

Sprecher's arguments for reduction of sentence reraise matters carefully considered at the hearing of his original sentence and at the subsequent hearing in connection with the reconsideration of his sentence. The application for further reduction of sentence is denied.

CONCLUSION

Sprecher has not demonstrated that he was denied effective assistance of counsel, that the government engaged in misconduct

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A: Right.

Q: You were brought to FBI headquarters in Utah somewhere?\

A: Yes.

Q: And you met with some of the agents who had up until that point successfully fooled you?

A: Yes.

Q: And you knew in effect the jig was up?

A: Oh, sure.

Q: I mean, they told you they had taped most if not all of the conversations you had had with them?

A: Yes, they told me at FBI headquarters.

Q: You knew there was no hope about avoiding some responsibility for that situation, am I right

A: Right.

Trial Tr. 699-700.

during his trial, or that his sentence should be reduced. The motions attacking Sprecher's conviction and sentence are denied.

SO ORDERED.

Dated: New York, New York
March 29, 1994

Miriam Goldman Cedarbaum/signature
MIRIAM GOLDMAN CEDARBAUM
United States District Judge.

Supreme Court, U.S.
FILED
SEP 18 1995
CLERK

No. 95-82

In the Supreme Court of the United States

OCTOBER TERM, 1995

BENJAMIN G. SPRECHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

16 pp

QUESTIONS PRESENTED

1. Whether the courts below correctly resolved petitioner's allegations of ineffective assistance of counsel, first raised in a post-conviction motion under 28 U.S.C. 2255.

2. Whether the district court correctly determined that petitioner's counsel did not prevent him from exercising his right to testify at trial.

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In the Supreme Court of the United States

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BENJAMIN G. SPRECHER, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of petitioner's motion under 28 U.S.C. 2255 (Pet. App. A1-A5) is unreported, but the decision is noted at 50 F.3d 3 (Table). The opinion of the district court (Pet. App. A8-A20) is unpublished. The opinion of the court of appeals affirming petitioner's conviction is reported at 988 F.2d 318; the district court's opinion and verdict following petitioner's bench trial is reported at 783 F. Supp. 133.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1995. A petition for rehearing was

denied on March 16, 1995. On June 5, 1995, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 14, 1995, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to commit securities fraud and related false statement and obstruction of justice offenses, in violation of 18 U.S.C. 371, 1001, 1503, 1505, and 1621. He was sentenced to concurrent terms of 46 months' imprisonment and two years' supervised release on each count; he was also fined $50,000. *United States* v. *Sprecher*, 783 F. Supp. 133 (S.D.N.Y. 1992). The court of appeals affirmed the convictions but remanded for resentencing. *United States* v. *Sprecher*, 988 F.2d 318 (2d Cir. 1993). On remand, the district court resentenced petitioner to 37 months' imprisonment.

Petitioner then brought several motions for post-conviction relief pursuant to 28 U.S.C. 2255. Following an evidentiary hearing, the district court denied the motions (Pet. App. A8-A20), and the court of appeals affirmed (Pet. App. A1-A5).

1. In his post-conviction motions, petitioner argued that his trial counsel, Ivan S. Fisher, provided ineffective assistance of counsel and that the government engaged in misconduct. He claimed that his counsel provided ineffective assistance for several reasons: (1) that Fisher failed to disclose a conflict of interest stemming from his pending state disciplinary proceedings, which arose from his 1989

guilty plea to misdemeanor tax charges; (2) that Fisher provided a less than vigorous defense out of fear of government retaliation; (3) that Fisher coerced petitioner into waiving his right to testify; and (4) that counsel's performance was deficient because he failed to call various potential witnesses, object to certain evidence, or make certain arguments or other trial decisions. Pet. App. A10-A14; Gov't C.A. Br. 11. Petitioner's claim of government misconduct was based on his allegation that the government failed to turn over materials required by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. 3500, and that the government knowingly allowed certain witnesses to commit perjury. Pet. App. A15; Gov't C.A. Br. 11-12.

In response to petitioner's allegations of ineffective assistance of counsel, the government submitted affidavits of Fisher, his associate, and petitioner's co-defendant G. Alexander Novak. The government submitted a declaration and affidavits from two prosecutors and an FBI agent in response to the allegations of government misconduct. The district court also held an evidentiary hearing. Pet. App. A11; Gov't C.A. Br. 12-15.

In a written opinion, the district court denied all of petitioner's claims. The court first noted that not all of petitioner's allegations of ineffective assistance of counsel were properly raised in a Section 2255 petition. Under *Billy-Eko* v. *United States*, 8 F.3d 111 (2d Cir. 1993), because petitioner had been represented by new counsel on direct appeal, his claims that did not require further development of the record were procedurally barred if they had not been raised on direct appeal. Pet. App. A10. Thus, the district court rejected as procedurally barred a number of

petitioner's allegations relating to his counsel's trial performance, *i.e.*, the failure to make certain objections or ask particular questions. The court also found, however, that those allegations related to matters of trial strategy and therefore would not support a claim of ineffective assistance in any event. Pet. App. A10; see *Strickland* v. *Washington*, 466 U.S. 668, 688 (1984); *Michel* v. *Louisiana*, 350 U.S. 91, 101 (1955); *United States* v. *Hon*, 17 F.3d 21, 26-27 (2d Cir. 1994); *United States* v. *Javino*, 960 F.2d 1137, 1145 (2d Cir.), cert. denied, 113 S. Ct. 477 (1992).

With regard to petitioner's claim that Fisher's disciplinary proceedings created a conflict of interest that deprived petitioner of the effective assistance of counsel, Fisher testified at the evidentiary hearing that he had discussed his legal problems with petitioner several times; petitioner's co-defendant (Novak) also testified that he was aware of Fisher's situation and that he had discussed it with petitioner. In contrast, petitioner testified that he was only vaguely aware of Fisher's legal problems and did not know their full nature and scope. The district court concluded that Fisher and Novak were "extremely credible witnesses." The court found that petitioner was aware of his trial counsel's legal difficulties and that "his testimony that he would not have retained Fisher if he had had more information is unworthy of belief." Pet. App. A11.

The district court also rejected petitioner's allegations that Fisher was prevented from pursuing a vigorous defense by his fear of government retaliation. The court found that "[t]hroughout the trial Fisher was an intelligent and diligent advocate for his client" who "repeatedly challenged the government." Pet. App. A11. The district court carefully

considered the relevant facts concerning petitioner's claims that Fisher prevented him from testifying at trial and failed to call certain important witnesses, and rejected both contentions. The court found that petitioner was well aware of his right to testify, discussed that option thoroughly with his attorney, and eventually agreed with Fisher's advice not to take the stand. *Id.* at A12-A13. And the court concluded that none of the witnesses petitioner claimed should have been called "could have provided significant evidence on any of the central issues." *Id.* at A14.

Finally, although the district court noted that petitioner's claims of government misconduct were procedurally barred, it nevertheless considered the claims and found them meritless. Pet. App. A14-A19.[1]

2. Petitioner renewed all of his claims on appeal. The court of appeals affirmed, discussing only the claim of Fisher's alleged conflict of interest. Because the district court was unaware of the alleged conflict at the time of trial, the court of appeals noted, it was unable to follow any procedures to ensure that petitioner made a knowing and intelligent waiver of his counsel's possible conflict. The district court relied on its finding that Fisher had explained the alleged conflicts to his client; but the court of appeals had previously found it insufficient to rely on the very attorney whose capacity to act in his client's interest is in question to explain the ramifications of potential conflicts to the defendant. Pet. App. A3.

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[1] Petitioner also argued that his sentence should be reduced, but the district court rejected those arguments as well, noting that they had already been carefully considered both at the original sentencing and at the resentencing. Pet. App. A19.

In the absence of an on-the-record waiver, the court of appeals considered whether Fisher's alleged conflicts denied petitioner the effective assistance of counsel. Finding no actual conflict of interest stemming either from Fisher's earlier criminal prosecution or from his state disciplinary proceedings, the court of appeals concluded that at most Fisher labored under a potential conflict of interest and that petitioner suffered no prejudice in light of the district court's finding that Fisher conducted an intelligent and diligent defense. Pet. App. A4.

As for petitioner's other arguments, the court of appeals stated only that it had carefully considered them and found them meritless. Pet. App. A4.

ARGUMENT

1. Petitioner contends (Pet. 6-16) that this Court should grant review to resolve a conflict among the courts of appeals on the question whether certain claims of ineffective assistance of counsel must be raised on direct appeal or be considered procedurally defaulted. To the extent that some courts differ slightly in their procedural rules for bringing claims of ineffective assistance of counsel, however, this case does not directly implicate that variation, since the courts below actually addressed all aspects of petitioner's ineffectiveness claim and rejected each of them on the merits.

This Court has "long and consistently affirmed that a collateral challenge may not do service for an appeal." *United States* v. *Frady*, 456 U.S. 152, 165 (1982) (citing cases). In order to ensure that final judgments command respect, and that their binding effect does not last only until "the next in a series of endless postconviction collateral attacks," *ibid.*, the

Court has established a more stringent standard of waiver on collateral attack than the "plain error" standard that is used on direct appeal. When a defendant has failed to raise a claim both in the trial court and on his direct appeal, he must clear a "significantly higher hurdle than would exist on direct appeal." *Id.* at 166. To obtain relief on collateral attack, the defendant must show both "cause" for failing to raise the issue before his conviction became final, and "actual prejudice" resulting from the alleged error. *Id.* at 168; *Wainwright* v. *Sykes*, 433 U.S. 72, 84, 87 (1977).

On the other hand, claims of ineffective assistance of counsel ordinarily must be raised in the first instance in a motion under 28 U.S.C. 2255. See *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984); *United States* v. *Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc); *Billy-Eko* v. *United States*, 8 F.3d 111, 114 (2d Cir. 1993). That is because the record on appeal typically does not permit the reviewing court to make an informed decision with respect to a claim of ineffectiveness that is raised for the first time at that stage. In addition, if the same lawyer represents the defendant at trial and on appeal, it is unrealistic to expect that lawyer to argue on appeal that his own trial performance was ineffective. Accordingly, the courts of appeals have expressed a strong preference (or in some cases required) that an ineffective assistance claim be presented to the district court in the first instance in a motion under Section 2255.[2]

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[2] See, *e.g.*, *United States* v. *Mala*, 7 F.3d 1058, 1063 (1st Cir. 1993), cert. denied, 114 S. Ct. 1839 (1994); *United States* v. *Billy-Eko*, 8 F.3d 111, 114 (2d Cir. 1993); *United States* v. *DeRewal*, 10 F.3d 100, 103-104 (3d Cir. 1993), cert. denied, 114

The Second Circuit has expressed a limitation on this general rule. It requires defendants to raise a claim of ineffective assistance of trial counsel on direct appeal when the defendant is represented by new counsel on appeal and the claim is based solely on the trial record. *Billy-Eko* v. *United States*, 8 F.3d at 115. See also *Guinan* v. *United States*, 6 F.3d 468, 472 (7th Cir. 1993).

The United States, however, has advocated one uniform rule for all claims of ineffective assistance of trial counsel, so that the rule is clear and easy to apply. See *Billy-Eko*, 8 F.3d at 115; *Guinan*, 6 F.3d at 475 (Easterbrook, J. concurring) (discussing *Billy-Eko* v. *United States*, 113 S. Ct. 2989 (1993); *Diaz-Albertini* v. *United States*, 498 U.S. 1061 (1991); *Chappell* v. *United States*, 494 U.S. 1075 (1990), all of which were granted, vacated, and remanded for further consideration in light of the position asserted by the Solicitor General).

Petitioner claims that the Second Circuit's rule requiring certain claims of ineffective assistance of counsel to be raised on direct appeal on pain of default conflicts with the general rule followed by other courts, which allows all such claims to be raised in the first instance in a motion under 28 U.S.C. 2255. He urges this Court to grant review and establish a

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S. Ct. 1544 (1994); *United States* v. *Smith*, No. 94-5724 (4th Cir. Aug. 21, 1995), slip op. 16; *United States* v. *Navejar*, 963 F.2d 732, 735 (5th Cir. 1992); *United States* v. *Daniel*, 956 F.2d 540, 543 (6th Cir. 1992); *United States* v. *Kellum*, 42 F.3d 1087, 1094-1095 (7th Cir. 1994); *United States* v. *Thompson*, 972 F.2d 201, 203-204 (8th Cir. 1992); *United States* v. *Mal*, 942 F.2d 682, 689 (9th Cir. 1991); *United States* v. *Galloway*, 56 F.3d 1239 (10th Cir. 1995) (en banc); *United States* v. *Casamayor*, 837 F.2d 1509, 1516 (11th Cir. 1988), cert. denied, 488 U.S. 1017 (1989).

uniform procedure for ineffectiveness claims. But whatever tension exists between the rule generally followed by all the courts and the narrow limitation on that rule established by the Second Circuit is not presented in the instant case. Here the district court actually considered each aspect of petitioner's ineffectiveness claim, so the different rule followed by the Second Circuit in certain circumstances actually made no difference in petitioner's case.

The district court conducted an evidentiary hearing on petitioner's principal claim, a conflict of interest involving his trial counsel, and also considered in conjunction with that claim the overall performance of his trial counsel. Far from finding petitioner's ineffectiveness claim procedurally barred, the district court conducted an exhaustive inquiry into the primary basis for petitioner's allegation of ineffective assistance of counsel, and it considered on the merits all the allegations made by petitioner, even those that should have been procedurally barred by the law of the circuit. See Pet. App. A10, A14. The district court stated that certain aspects of petitioner's ineffectiveness claim were barred by the rule of *Billy-Eko*, but the court considered those allegations anyway and found them all essentially matters of trial strategy that would not support a claim of ineffectiveness.[3]

Petitioner also claims (Pet. 10-11) that the decision below has added confusion to the rule laid down in *Billy-Eko*; he refers to the statement of the district court that some of petitioner's allegations were

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[3] The district judge was the same one who had presided at petitioner's bench trial, so she was obviously well suited to assess the quality of his counsel's representation.

barred because they were not based on "matters outside the trial record." Pet. App. A10. That statement suggests, petitioner asserts, that any claim relating to matters that occurred at trial must be raised on direct appeal, without regard to whether the trial record provides a full development of the facts necessary to analyze the allegation of attorney ineffectiveness. Read in context, however, the district court's statement, following a citation to *Billy-Eko*, was clearly meant as a restatement of the limitation expressed in *Billy-Eko*, *i.e.*, that when a defendant has new counsel on direct appeal and a claim that needs no further record development, he must raise his ineffective assistance of counsel claim at that time. In this case, the district court explained, a number of petitioner's claims related simply to matters of trial strategy and could clearly be considered without taking any further evidence; indeed, they were so plainly within the range of normal trial tactics that they would not support any claim of ineffective assistance of counsel. As the district court said elsewhere in its opinion, petitioner's basic complaint with respect to a number of his allegations of attorney ineffectiveness was essentially "an argument that his attorney should have presented his defense in a different way," obviously not the kind of allegation that would amount to a constitutional deficiency in his representation. Pet. App. A14; *Strickland* v. *Washington*, 466 U.S. at 688.

It is plain from the opinion of the district court that, despite its observation that some of petitioner's claims were procedurally barred, the court carefully and thoroughly examined the entirety of Fisher's representation of petitioner and concluded that there was no constitutional inadequacy. Thus, whatever

limitation the Second Circuit places on the general rule for presenting claims of ineffective assistance of counsel has had no effect on the outcome of this case. Petitioner received complete consideration of his claims on the merits, despite his failure to raise those issues on direct appeal.

2. Petitioner also contends (Pet. 20-23) that the courts below erred in holding that he was not denied his right to testify. He claims that the decision in this case conflicts with the decision of the Eleventh Circuit in *Nichols* v. *Butler*, 953 F.2d 1550 (1992) (en banc). That argument is without merit.

In *Nichols* v. *Butler*, the court held that it was ineffective assistance of counsel for an attorney to threaten to withdraw during trial if his client insisted on testifying, because the defendant was thus forced to choose between his right to counsel and his right to testify. 953 F.2d at 1552-1554. The district court in this case heard testimony on petitioner's claim that Fisher kept him from testifying and credited Fisher's testimony that he did not remember ever threatening to withdraw. Fisher said that he and his client had a number of "heated discussions" about the wisdom of petitioner's testifying, but that each conversation concluded with petitioner deferring to his attorney's opinion. Pet. App. A12.

The district court therefore concluded that the case before it was distinguishable from *Nichols* and more closely resembled another case, *United States* v. *Aguirre*, 912 F.2d 555, 562-563 (2d Cir. 1990). The court of appeals in *Aguirre* held that, where the defendant discussed his right to testify with his counsel and ultimately agreed to follow his lawyer's advice not to take the stand, there was no ineffective assistance of counsel.

Petitioner incorrectly asserts (Pet. 21) that the district court accepted his claim that Fisher may have threatened to withdraw if petitioner insisted on testifying. In fact, the district court credited Fisher's recollection that he did not threaten to withdraw. Fisher said that "while it is possible he might have said such a thing in the heat of the moment," he did not remember making such a threat. Rather, Fisher recalled that each of his discussions with petitioner on the subject of his testifying concluded with petitioner telling him that Fisher, as his attorney, should make the decision. Pet. App. A12. In light of that finding, the decision below does not conflict with the holding of *Nichols*. Petitioner's disagreement with the district court's factual finding that no coercion occurred is not an issue that merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

KATHLEEN A. FELTON
Attorney

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